United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1027

To be argued by
GREGORY L. DISKANT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1027

UNITED STATES OF AMERICA,
Appellee,

—v.—

GEORGE GREEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

George Green appeals from a judgment of conviction entered on December 16, 1976, in the United States District Court for the Southern District of New York, following his guilty plea before the Honorable Kevin T. Duffy, United States District Judge.

Indictment 75 Cr. 1102 was filed on November 14, 1975, charging George Green, in twelve counts, with possessing stolen money orders issued by the Postal Service, knowing them to be stolen, in violation of Title 18, United States Code, Section 500.

On December 7, 1976, Green entered a plea of guilty to Counts One through Six of the Indictment, reserving his right to appeal the denial of speedy trial motions.*

* This procedure has been approved by this Court in *United States* v. *Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States* v. *Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975); *United States* v. *Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

On December 16, 1976, Judge Duffy sentenced Green to two years imprisonment on each count, to run concurrently with each other and with the sentence Green was then serving on a South Carolina conviction.

Green is presently serving his sentence.

Statement of Facts

On March 12, 1975, Postal Contract Station No. 1 in Charleston, South Carolina, was robbed of various blank United States Postal Money Orders. George Green was arrested in the Southern District of New York on May 20, 1975 and charged in a complaint filed that day before the United States Magistrate with having converted to his own use blank money orders taken in the Charleston robbery in violation of 18 U.S.C. § 500. Bail was set at $2,500 cash or surety and Green was incarcerated when he was unable to meet that bail. On May 21, 1975, bail was reduced and set at a $1,000 personal recognizance bond to be secured by $100 cash. Green met that bail and was released from custody. (App. 11).*

Indictment 75 Cr. 1102 was filed on November 14, 1975. It charged Green, in twelve counts, with possessing stolen blank money orders issued by the Postal Service, knowing them to have been stolen. 18 U.S.C. § 500. Green failed to appear for his arraignment on November 17, 1975, and a bench warrant was issued. On November 18, 1975, the Government filed its notice of readiness for trial. (App. 1).

Green was ultimately located in the Federal Correctional Institution in Tallahassee, Florida, and on March 4, 1976, the Government sought a writ of habeas corpus to secure his presence in the Southern District of New York.

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* Citations to "App." refer to the separate appendix filed by Green; citations to "Br." refer to Green's brief.

(App. 9). Green was returned to New York on March 11, 1976.

On June 28, 1976, Green filed his first motion for dismissal of the indictment. He claimed the Government had violated the Southern District's 1973 Plan for Achieving Prompt Disposition of Criminal Cases ("the 1973 Plan") by failing to bring him to trial. He asserted no prejudice caused by delay, nor did he claim that he had previously asserted his right to a speedy trial.* (App. 12-16). The Government filed its answer on July 14, 1976. It noted that the only local rule pertinent to the Government's obligation to bring the case to trial was the obligation that it be ready for trial within six months from the date of arrest. The Government affidavit further observed that it filed its notice of readiness for trial on November 18, 1975, within six months of Green's May 20, 1975 arrest. (App. 23-25).

Green filed two reply affidavits on July 15, 1976 (App. 21, 27), and on July 20, 1976, Judge Duffy filed an order, without opinion, denying the motion. (App. 1).

On August 27, 1976, Green filed his second motion to dismiss the indictment. He claimed violations of his Sixth Amendment right to a speedy trial, the Southern District's 1973 Plan, and the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* He asserted no prejudice caused by the delay, nor did he claim that he had previously asserted his right to a speedy trial. (App. 36-41). On September 3, 1976, Judge Duffy denied the motion without calling for a response from the Government.

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* Green did assert that he had previously filed a motion to dismiss the indictment for failure to grant a speedy trial, but that the motion had inexplicably been lost by the clerk's office. (App. 15).

ARGUMENT

POINT I

Green Was Not Denied His Rights under the Southern District's 1973, 1975, or 1976 Plans for Achieving Prompt Disposition of Criminal Cases or under the Speedy Trial Act.

Green contends that his failure to go to trial for approximately nine months after his return to the Southern District constituted a violation of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases. He asserts that his case was required to be brought to trial within 180 days. This claim, which appears to be a misguided reference to the Southern District's 1976 Statement of Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases ("the 1976 Plan"), is utterly without merit.

Prior to 1976, neither the 1973 Plan, nor the 1975 Southern District Interim Plan ("the 1975 Plan"), which went into effect on September 29, 1975, included any time limit in which a case must be brought to trial. Such a time limit—180 days—was added only by the 1976 Plan, effective July 1, 1976. This addition was mandated by the Speedy Trial Act, also effective July 1, 1976, which required that, absent excludable time periods, all criminal cases must be brought to trial within 180 days of arraignment on the information or indictment. 18 U.S.C. §§ 3161(c), (g). Accordingly, Rule 5 of the 1976 Plan provides in pertinent part:

> "5. *Time Within Which Trial Must Commence.* (a) *Time Limits.* The trial of a defendant shall commence within the following time limits:
>
> (1) If the arraignment occurs before July 1, 1976, within 180 days of July 1, 1976; . . ."

Since Green was arraigned before July 1, 1976, Rule 5's 180-day requirement mandated only that Green be brought to trial within 180 days of July 1, 1976, *i.e.*, by December 28, 1976. Because Green pleaded guilty within that time period, he cannot claim his rights under either Rule 5 of the 1976 Plan or the Speedy Trial Act were violated.*

Nor can Green claim that *any* time limit under the various Plans or under the Speedy Trial Act was violated. Other than the 180-day rule, which was honored in this case, the only relevant time limit imposed by law was Rule 4 of the 1973 Plan:

> "4. All Cases: Trial Readiness and Effect of Non-Compliance.
>
> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest." **

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* In the District Court Green also argued that he was required to be tried within 90 days because he was in custody. The argument was purportedly based on Rule 6(a)(1) of the 1976 Plan, which, in accordance with the Speedy Trial Act, provides:

> "The trial of a defendant held in custody solely for the purpose of trial on a Federal charge shall commence within 90 days following the beginning of continuous custody."

See 18 U.S.C. § 3164(b).

Of course, Rule 6(a)(1) is inapplicable to Green, who was held in custody not for the instant charges, but as a result of his conviction and five year sentence in the South Carolina proceeding.

** This language is identical to Rule 5 of the 1975 Plan.

The earliest of the itemized events that occurred in this case was Green's arrest on May 20, 1975. Since the Government was ready for trial on November 18, 1975, within six months of the date of arrest, Rule 4 was complied with in full.

Accordingly, Green has presented no basis for relief under either the various District Court Plans or the Speedy Trial Act.

POINT II

Green Was Not Denied His Sixth Amendment Right to a Speedy Trial.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Supreme Court set down a four-part balancing test for assessing whether a criminal defendant has been denied his constitutional right to a speedy trial. The four factors to be assessed are: length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. *Id.*, at 530. By no fair weighing of these factors in this case can one conclude that Green was denied his Sixth Amendment right to a speedy trial.

A. Length of Delay

The total delay from Green's May 20, 1975 arrest to his December 7, 1976 guilty plea was 18 1/2 months. While this delay is longer than would now be permitted under the Speedy Trial Act, absent exclusions,* it "could not by itself be classified as *per se* excessive." *United*

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* It bears noting that significant excludable time periods are present in this case. See note * * *, p. 8 *infra*.

States v. *Vispi*, 545 F.2d 328, 333 (2d Cir. 1976) (20 month delay). *See also United States* v. *Mejias*, Dkt. No. 76-1384, slip op. 2269 (2d Cir., March 10, 1977) (20 month delay); *United States* v. *Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977) (34 month delay); *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973) (28 month delay); *United States* v. *Saglimbene*, 471 F.2d 16 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (six year delay); *United States* v. *Fasanaro*, 471 F.2d 717 (2d Cir. 1973) (four year delay). Accordingly, Green must rely on "the peculiar circumstances of the case" in order to turn this facially reasonable delay into an unconstitutionally long one. *Barker* v. *Wingo*, *supra*, 407 U.S. at 530-31. No such circumstances are present in this case.

B. The Reason for the Delay

While the 18 1/2 month delay in this case is not on its face unreasonably long, when the reasons for the delay are analyzed, the period of delay fairly attributable to the Government shrinks considerably. Substantial delays were caused by the defendant's absence from the district and by his pre-trial motions. The remainder of the delay was caused by the Government's investigation of the case and by institutional delays.

While the Government took almost six months in which to obtain the indictment, it stood ready for trial only a few days after the indictment was filed. Moreover, after filing its notice of readiness for trial on November 18, 1975, the Government remained ready for trial, never requesting at any time an adjournment for any reason.

Although the Government was ready for trial on November 18, 1975, Green was not. He was in South Carolina and, so far as the Government knew, a fugi-

tive.* The delay from Green's disappearance in September, 1975 until his return to the Southern District of New York on March 11, 1976, is properly attributable to Green. Indeed, in his motion papers below, Green properly excluded this time period from his own computations. (App. 39).

After his return to the Southern District, Green filed his two successive dismissal motions, causing further delay. This delay—from June 28, 1976 to July 20, 1976 and from August 27, 1976 to September 3, 1976—is also chargeable to Green.

In sum, of the 18 1/2 months from arrest to guilty plea, approximately 7 months of delay was caused by Green. And of the 12 1/2 months from indictment to guilty plea, approximately 4 1/2 months delay was caused by Green. The remaining totals—11 1/2 months from arrest to guilty plea and 8 months from indictment to guilty plea—may be attributed in part to the Government and in part to institutional delays in setting the case down for trial.** Such short delays are not unreasonable by any standard.***

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* While Green maintained that he went to South Carolina with the Government's consent, App. 13-14, 38, 42-43, a point that the Government disputed, App. 23-24, 48, Judge Duffy found it unnecessary to resolve the factual dispute. Whether Green left with or without the Government's consent is irrelevant. What matters is that he was unavailable for trial in the Southern District while he stood trial and was sentenced in South Carolina.

** Of this time, none of the post-indictment delay can fairly be charged to the Government. Rather, it is all institutional delay, "[a] more neutral reason" that "should be weighted less heavily." *Barker* v. *Wingo, supra,* 407 U.S. at 531.

*** Analysis of the facts of this case in terms of the Speedy Trial Act and its *prima facie* reasonable time periods and exclusions is instructive. If the Act had been applicable prior to July 1, 1976, Green would have had to be tried within 180 days

[Footnote continued on following page]

C. The Defendant's Assertion of the Right

Green never demanded a speedy trial. Indeed, he never expressed any interest whatsoever in having his case promptly heard. He did file two motions seeking to have the indictment dismissed for failure to afford him a speedy trial.* However, his interest in having the charges against him dropped was never matched by any expressed interest in having the charges against him promptly resolved. In these circumstances, Green cannot properly be credited with having asserted his right to a speedy trial.**

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of November 17, 1975, the date of arraignment on the indictment. In fact, he pleaded guilty 387 days later—on December 7, 1976. Of that time, however, the 113-day period from November 17, 1975 to March 11, 1976—the time during which Green was tried and convicted in South Carolina and his whereabouts were unknown to the Government—would be excludable under 18 U.S.C. §§ 3161(h)(1)(C), 3161(h)(1)(F), and 3161(h)(3)(A). Additionally, the 22-day period from June 28, 1976 to July 20, 1976 and the 7-day period from August 27, 1976 to September 3, 1976—the time of the hearings and consideration of Green's pre-trial motions—would be excludable under 18 U.S.C. §§ 3161(h)(1)(E) and 3161(h)(1)(G). In sum, a total of 142 days would be excludable under the Speedy Trial Act. Thus, Green was brought to trial within 245 days of arraignment on the indictment, only some two months longer than would now be permitted under the Act.

* Only the second of the two motions referred to the Sixth Amendment right to a speedy trial. (App. 37). The first motion was grounded solely on the Southern District's 1973 Plan.

** The Supreme Court noted the difference between a motion to dismiss the indictment and an asserted interest in a speedy trial in *Barker* v. *Wingo* itself:

> "[Approximately three and one half years after the charges were brought] in response to another motion for continuance, Barker moved to dismiss the indictment. The record does not show on what ground this motion was based, although it is clear that no alternative motion was made for an immediate trial. Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." 407 U.S. at 534-35.

D. Prejudice to the Defendant

For the first time on this appeal Green claims prejudice as a result of the delay in resolving his case—the loss of an opportunity for an early parole. Such a claim of prejudice was not raised in either of Green's earlier motions to dismiss the indictment. Since Green stipulated he retained only the right to appeal the denials of the motions he had earlier made (App. 54), this Court has "no appellate jurisdiction to consider an issue he had not raised in his motion[s] below." *United States* v. *Christopher*, 546 F.2d 496, 497 (2d Cir. 1976). In any event, the claim of prejudice is without merit.

First, the claim is both conclusory and speculative. Since the claim was not presented below, the Government was denied the opportunity to contest its basis in fact, and this Court has no way by which to judge its merit. In any case, by Green's own statement the claim is speculative—he asserts he was denied the "*opportunity* for early parole." (Br. 5) (emphasis added). But it is *actual* and not presumed or possible prejudice that must be shown to sustain a claim of Sixth Amendment prejudice. *United States* v. *Roemer*, 514 F.2d 1377, 1383 (2d Cir. 1975). Cf. *United States* v. *Marion*, 404 U.S. 307, 326 (1971). Green has not met this standard; he does not claim he was in fact denied an early parole because of delay in this case. *Cf. Shelton* v. *Taylor*, Dkt. No. 76-2099, slip op. 1893, (2d Cir., Feb. 22, 1977).

Second, the lost opportunity of which Green complains was to some extent inevitable, at least if he means by his claim that his presence in the Southern District of New York rather than in the Federal Correctional Institution in Tallahassee, Florida, was the reason for his lost opportunity. If mere absence from the Florida institution is the basis for Green's complaint, then such absence was

necessary if Green was to be tried in the Southern District of New York at all. To sustain this claim of prejudice, then, Green must show not only that he was actually prejudiced by removal from the Florida institution, but that there was some way for the Government to avoid that prejudice and still bring Green promptly to trial in this district on the indictment then pending against him. Needless to say, Green has not even attempted to make such a showing.*

Lastly, even if Green met this burden, it is far from clear that the prejudice of which he complains would justify dismissal of the indictment. Prejudice caused by denial of an early parole in another case has nothing whatsoever to do with the truth-seeking process. Of the interests the speedy trial clause is designed to protect, the "most serious" is, of course, "to limit the possibility that the defense will be impaired. . . . [T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker* v. *Wingo*, *supra*, 407 U.S., at 532 (footnote omitted). Where the only prejudice asserted is collateral to the truth-seeking process, as it is here, a greater showing of prejudice should be necessary before an indictment is dismissed. See *United States* v. *Cyphers*, *supra*, slip op. at 1747.

In short, Green has shown no prejudice at all caused by the 18 1/2 month delay in this case, let alone prejudice sufficient to justify dismissal of the indictment.

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* It bears noting that by removing Green from the Florida institution and promptly resolving the charges pending against him in the Southern District of New York, the Government afforded Green the opportunity to have his sentence on the instant charges run concurrently with the sentence on the South Carolina charge. Judge Duffy gave Green the benefit of this opportunity by so sentencing him.

Analysis of the four factors mandated by *Barker* v. *Wingo* leads inescapably to the conclusion that Green was not denied his Sixth Amendment right to a speedy trial. The 18 1/2 month delay from arrest to guilty plea was not unduly long; much of the delay was caused by Green himself; Green showed no interest in a speedy trial, only in dismissal of the indictment; and Green has shown no prejudice resulting from the delay. None of the balancing factors inclines towards a finding of a Sixth Amendment violation.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GREGORY L. DISKANT being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of April, 1971 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Irving Katcher, Esq.
38 Park Row
New York, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Gregory L. Diskant

Sworn to before me this
20th day of April, 1971

Alma Hanson

ALMA HANSON
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Commission Expires March 30, 1972